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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

SANDRA DURANT, Personally and on Behalf of the Heirs at Law of CHARLES N. DURANT, DECEASED, and SANDRA DURANT, as Administratrix of the Estate of CHARLES N. DURANT, DECEASED, Respondents,

v.

JAMES NENEMAN,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 10, 1989

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Tenth Circuit err in reversing the decision of the United States District Court for the District of Kansas which had granted petitioner's Motion to Dismiss for lack of subject matter jurisdiction based upon the Feres Doctrine?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioner James Neneman and the Respondent Sandra Durant, personally and on behalf of the heirs-at-law of Charles N. Durant, deceased, and as administratrix of the estate of Charles N. Durant, deceased.

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IN THE SUPREME COURT OF THE UNITED STATES
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SANDRA DURANT, Personally and
on Behalf of the Heirs at Law
of CHARLES N. DURANT, DECEASED,
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v.

JAMES NENEMAN,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Lt. James Neneman, respectfully prays that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Tenth Circuit reversing the decision of the United States District Court for the

District of Kansas and remanding the matter back to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of the Appellate Court. The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 11, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is to be reported as *Sandra Durant, personally and on behalf of the heirs-at-law of Charles N. Durant, deceased, and Sandra Durant, as administratrix of the estate of Charles N. Durant, deceased and James E. Tassin v. James Neneman*, 884 F.2d 1350 (1989) and is attached in the appendix hereto at page A-1, *infra*. The decision of the United States District Court for the District of Kansas, the Honorable Dale E. Saffels, Case No. 87-2592S, is attached in the appendix hereto at page A-21, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

STATEMENT OF CASE

Respondent filed suit against petitioner in the United States District Court for the District of Kansas for money damages as a result of the alleged wrongful death of Charles Durant.

It is undisputed that Charles Durant, deceased, was a member of the military of the United States and engaged in a physical training exercise on a military base in Fort Riley, Kansas at the time of his death. The petitioner, also a member of the military of the United States, while in uniform and driving his private vehicle on Fort Riley en route to reporting to his duty station, ran into Charles Durant. Charles Durant allegedly died as a result of the impact. Charles

Durant was a seargant in the United States Army. Petitioner was a lieutenant in the United States Army. Petitioner and Charles Durant were on active duty status at the time of the accident. The military police at Fort Riley, Kansas investigated the accident, and court marshal proceedings against Petitioner for negligent homicide were conducted.

Petitioner moved to dismiss the civil action on the grounds that the complaint failed to state a claim as a matter of law because petitioner was immune from suit, and, because the United States District Court did not have subject matter jurisdiction because of the Feres Doctrine. Furthermore, petitioner asserted that the District Court did not have subject matter

jurisdiction pursuant to the Federal Driver's Act, 28 U.S.C.A. §2679.

The District Court granted petitioner's Motion to Dismiss and respondent filed an appeal with the United States Court of Appeals for the Tenth Circuit. On appeal, the United States Court of Appeals for the Tenth Circuit held that the Feres Doctrine was inapplicable to the case and the District Court erred in dismissing the action on immunity grounds. The judgment of the District Court was reversed and the case was remanded for further proceedings. Petitioner did not file a Motion for Rehearing.

Petitioner has filed its timely petition for writ of certiorari to this Court.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the Tenth Circuit Court of Appeals disregarded the judicial doctrine adopted by this Court in the case of *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) and its progeny. Furthermore, the Tenth Circuit Court of Appeals failed to follow the rationale set forth in its prior decision of *Shaw v. United States*, 854 F.2d 360 (10th Cir. 1988) which supports the position of petitioner and which warranted affirming the decision of the District Court. The Tenth Circuit Court of Appeals decision in this case contravenes the decisions of this Court and of other federal appellate courts interpreting the Feres Doctrine and therefore warrants review.

In *Feres v. United States* 340 U.S. 135, 71 S. Ct. 153, 95 L.Ed. 152 (1950) the Supreme Court of the United States was called upon to address whether the Federal Tort Claims Act extends its remedy to one sustaining injury "incident to military service." *Feres v. United States, supra,* concerned three cases in which each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces. The Court stated on page 144 of the opinion that:

> "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedies to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service."

The Court further stated at page 146 of the opinion that:

> "We conclude that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the government has been governed exclusively by federal law. We do not think that Congress, in drafting this act, created a new cause of action dependent upon local law for service-connected injuries or death due to negligence."

A serviceman injured while on active duty on military property when doing an act arising out of military life constitutes an injury incurred "incident to service" making the Feres Doctrine applicable. *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987), and *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054,

97 L.Ed.2d 550 (1987). Clearly Sgt. Durant was injured while performing an act incident to service when he was training on the military base. The Feres Doctrine is therefore applicable in this case and defendant is immune from suit. The Court of Appeals erred in holding that the Feres Doctrine was not applicable.

The Tenth Circuit Court of Appeals held that the immunity established under the Feres Doctrine attaches only when an action has been brought against the United States government under the Federal Tort Claims Act set forth at 28 U.S.C.A. §2671 et seq. The sovereign immunity of the United States of America for injuries arising out of or incident to military service cannot be circumvented by the naming of the

individual military officials rather than the United States as a party defendant. *Gaspard v. United States*, 544 F.Supp. 55 (E.D. La. 1982); and *Jaffee v. United States*, 663 F.2d 1226 (3rd Cir. 1981); and *Bois v. Marsh*, 801 F.2d 462, 470 (D.C. Cir. 1986). Therefore, the Feres doctrine applies to this case even though the United States was not named as a defendant.

The Tenth Circuit Court of Appeals also held that the intramilitary immunity of the Feres Doctrine should not be applied to shield military personnel from common law actions based on their non-military conduct. In making its decision Tenth Circuit Court of Appeals focused upon the acts of petitioner rather than Sgt. Durant in determining the applicability of the

Feres Doctrine. The Feres Doctrine is concerned with the activity of the injured party, not the activity of the alleged negligent party in determining its application.

Numerous examples can be found throughout the decisions of the Federal Courts where, under similar factual circumstances, the Federal Courts applied the Feres doctrine and dismissed the plaintiff's petition. See Welch v. United States, 446 F.Supp. 75 (D.Conn. 1978); Millang v. United States, 817 F.2d 533 (9th Cir. 1987); McVan v. Bolco Athletic Company, 600 F.Supp. 375 (E.D. Pa. 1984); Chambers v. United States, 357 F.2d 224, 229 (8th Cir. 1966); Knight v. United States, 361 F.Supp. 708, 713 (W.D. Tenn. 1972); Degentesh v. United States, 230 F.Supp. 763 (N.D.

Ill. 1964) and Keisel v. Buckeye Donkey Ball, Inc., 311 F. Supp. 370 (E.D. Va. 1970). Respondent submits that the decision of the Tenth Circuit Court of Appeals has now created a conflict among the circuits which warrants review by this Court.

The Tenth Circuit Court of Appeals also held as a matter of law that petitioner was not acting within the scope of his military service at the time the alleged negligent act occurred. However, that determination is irrelevant for purposes of the application of the Feres doctrine. In *Nagy v. United States*, 471 F.Supp. 383 (D.C. Cir. 1979), the Court stated:

> "It is well established that a service member cannot sue the United States or other servicemen for injuries incident to his service in the Armed Forces. *Feres v. United States*, 340 U.S. 135, 71 Sup.Ct.

153, 95 L.Ed. 152 (1950). The rationale for the "incident to service" rule in the Feres decision is 3-fold: (1) Military discipline would be hindered if soldiers were allowed to sue the government for such injuries; (2) Congress does not intend the Federal Tort Claims Act to encompass plaintiffs in military service; and (3) A system of benefits is available to the injured soldier to compensate him for injuries incurred in the line of duty." (Emphasis added) 471 F.Supp. at 384

Sgt. Durant was acting within the scope of his employment when it is claimed he was killed by another on-duty serviceman. The Feres Doctrine is applicable in this case and the Tenth Circuit Court of Appeals erred in not applying the Feres Doctrine to this case. *United States v. Brown* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed 139 (1954) and *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed.2d. 1200 (1949).

The Tenth Circuit Court of Appeals held that there are two prongs of immunity under the Feres doctrine. One prong involves claims by plaintiff against the United States under the Federal Tort Claims Act. The Tenth Circuit Court of Appeals called these cases "true" Feres doctrine cases. The second prong involved claims of servicemen against military actors for acts committed within the context of military service. The Tenth Circuit Court of Appeals determined these type of cases involve the "doctrine of intra-military immunity." The Tenth Circuit Court of Appeals determined that the alleged negligent act of petitioner while driving his vehicle was an example of a claim which did not involve "true" Feres Doctrine cases but fell into that

category of cases under the "doctrine of intramilitary immunity." Therefore, the Feres doctrine did not apply to this case. Petitioner respectfully submits the appellate court erred in its analysis and in ruling the Feres doctrine did not apply to this case.

The Tenth Circuit Court of Appeals also determined that any immunity which has evolved from the Feres decision, *supra*, was never intended to protect the personal acts of an individual when those acts in no way implicate the function or authority of the military. The Tenth Circuit Court of Appeals concluded the actions of petitioner at the time of the accident were unrelated to the military. It is the position of Petitioner that his actions on the date of accident clearly implicate military

authority. Petitioner was a superior officer of Sgt. Durant. If the Feres Doctrine and the resultant immunity of petitioner are held not to apply to the facts of this case, on remand, the activities of the United States government which led up to this accident will be questioned. For example, relevant to the issue of the proximate cause of this accident will be a determination of why Charles Durant was running at the particular location so close to a roadway at the time of his death. In that regard, the policies and procedures of the United States Military concerning where its soldiers shall train will be drawn into question. Furthermore, the policies and procedures of the United States government in allowing superior officers to live off

military bases and requiring them to drive in the early morning hours onto the base would be relevant and drawn into issue. Finally, the policies and procedures of the military concerning the granting of off-duty passes and the time in which the personnel shall be required to return to base will be drawn into question. Simply put, if Sgt. Durant and his unit were not jogging where he was at the time of the accident, if petitioner was not allowed to live off base on the date of the accident, and, if petitioner had not been granted a pass prior to the accident, this accident and lawsuit would not have resulted. The United States government's rationale for allowing the individuals to be placed in the situation which created the

possiblity of the accident on the military base would wind up being questioned by the District Court and the jury. Clearly the decision-making processes of the United States Army would be involved should the respondent be allowed to proceed against petitioner. It must also be pointed out that military authorities have taken jurisdiction over this matter and have conducted court-martial proceedings against petitioner as a result of this accident. These proceedings were conducted under the Uniform Code of Military Justice (U.C.M.J.). The fact that the military authorities proceeded against petitioner under the U.C.M.J. is sufficient to show military control at the time of the injury. *Ordahl v. United States*, 646 F.Supp. 4 (D.Mt.

1985). It is illogical for the Tenth Circuit to conclude as a matter of law petitioner was not acting within the scope of his military service when at the same time the United States government is prosecuting petitioner because his actions were military related.

Finally, the Tenth Circuit Court of Appeals also ignored or did not address petitioner's claim that the Federal Employees' Compensation Act, 5 U.S.C.A. §8101 *et seq*. and the Veteran's Benefit Act 38 U.S.C.A. §301 *et seq*. applied and prevents this type of litigation as the acts were created to provide the exclusive remedy for any injury or death suffered by a federal employee while acting within the scope

of his or her employment. *Vantrease v. United States*, 400 F.2d 853 (6th. Cir. 1968). For this additional reason respondents' complaint should have been dismissed.

CONCLUSON

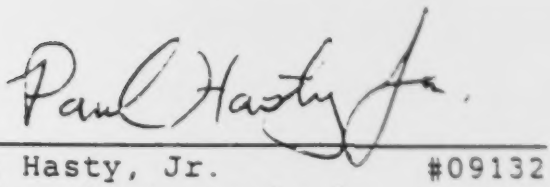
It is undisputed that Sgt. Durant was a military serviceman performing an activity incident to his military service when he allegedly was killed in a vehicular accident on a military base by another member of the military. It is further undisputed that petitioner was a superior officer, on active duty status, and in the process of physically reporting to his duty station when the accident occurred. The Feres Doctrine applies to this case. Petitioner is immune from suit and the district court lacks subject matter jurisdiction. The Tenth Circuit Court of Appeals erred in reversing the decision of the District Court which held the Feres doctrine applied. The Tenth Circuit Court of Appeals further erred in remanding this

case back to the District Court for further proceedings.

For these reasons, petitioner contends that a writ of certiorari by this Court should therefore be granted.

Respectfully Submitted,

WALLACE, SAUNDERS, AUSTIN
BROWN AND ENOCHS, CHARTERED

By 

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SANDRA DURANT, Personally and on Behalf of the Heirs at Law of CHARLES N. DURANT, Deceased, and SANDRA DURANT, as Administratrix of the Estate of CHARLES N. DURANT, Deceased; and JAMES E. TASSIN,
Plaintiffs-Appellants,

v.

JAMES NENEMAN,
Defendant-Appellee.

Appeal from the United States
District Court
For the District of Kansas
D.C. Nos. 87-2592S and 87-2591

Steven Hornbaker (Craig J. Altenhofen with him on the briefs) of Harper, Hornbaker & Altenhofen, Chartered, Junction City, Kansas, for Plaintiffs-Appellants.

Paul Hasty, Jr., (Jeffrey L. Lauersdorf with him on the brief) of Wallace, Saunders, Austin, Brown & Enochs, Chtd., Overland Park, Kansas, for Defendant-Appellee.

Before LOGAN, MOORE, and EBEL, Circuit Judges.

MOORE, Circuit Judge.

Plaintiffs Sandra Durant and James E. Tassin appeal from an order dismissing their complaints for damages. Ms. Durant, widow of Charles N. Durant, and Mr. Tassin claimed the negligence of defendant James Neneman caused the death of Mr. Durant and injuries to Mr. Tassin. Plaintiffs filed a civil action in the United States District Court for the District of Kansas, asserting diversity jurisdiction.[1] Albeit reluctantly, the court dismissed the complaints believing the result was compelled by

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[1]Mr. Tassin also asserted federal question jurisdiction. It is claimed in Mr. Tassin's complainit that he is a "citizen" of the State of Kansas. In Ms. Durant's complaint, filed by the same law firm, it is averred that defendant Neneman is a "citizen" of the State of Kansas. We, consequently, make no determination whether Mr. Tassin's assertions of diversity or federal question jurisdiction are valid.

Feres v. United States, 240 U.S. 135 (1950). We disagree and reverse because this is not the type of case to which Feres applies.

The immunity established in Feres attaches only when an action has been brought agasinst the government under the Federal Tort Claims Act. While policy reasons underlying Feres and its progeny also provide an immunity for military actors, the conditions which give rise to the application of that immunity are not present in this case. We hold that this intra-military immunity should not be applied to shield military personnel from common-law actions based on their nonmilitary conduct.

The underlying allegations of fact in this case are simple. At the time of the incident, both Mr. Durant and Mr. Tassin were engaged in a physical training exercise, apparently in military formation, running on a street on the Fort Riley, Kansas, military base. Plaintiffs claim that Mr. Neneman, in uniform and driving his private vehicle, ran into both Mr. Durant and Mr. Tassin.[2] Mr. Durant died as a result of his injuries, but Mr. Tassin recovered.

Plaintiffs subsequently filed separate civil actions against Mr. Neneman solely in his individual capacity upon theories of negligence.

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[2]It is undisputed that Mr. Neneman was on his way to his duty assignment at the time of the incident.

Defendant moved to dismiss the actions on the ground that the complaints failed to state claims because he is immune from suit. Defendant argued that because the injured parties were soldiers engaged in military activity at the time of the accident, Feres required dismissal.

The trial court agreed. The district court held that because the injured parties were engaged in military activity at the time they were allegedly struck by the defendant, Feres required dismissal of the action. This conclusion was prompted by the holding in United States v. Johnson, 481 U.S. 681 (1987), that the military status of the tort-feasor is irrelevant in the Feres analysis. Not only do we believe Feres inapposite, we also think the

trial court's reliance upon the Johnson principle was incorrect.

To explain our reasoning, we must first turn briefly to Feres. The case was actually three separate actions under the Federal Tort Claims Act (FTCA) for damages. Common to each case was the "fact underlying the three cases . . . that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." Feres, 340 U.S. at 138. The Court concluded "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146.

From this holding stems the first of what we recognize as two prongs of a

doctrine of immunity which courts have come to call "the Feres doctrine." The first prong consists of those cases in which a plaintiff connected with the military asserts liability against the United States under the FTCA for injury arising out of activity which is incident to service. These are true Feres cases, and in an unbroken line from Feres, courts have granted immunity to federal defendants upon Feres rationales.

The second prong consists of those cases in which liability is asserted by servicemen against military actors for acts committed within the context of military service. From these cases have developed what we refer to as "the doctrine of intra-military immunity." While courts employ Feres rationales in

applying intra-military immunity, it cannot be said accurately these are true Feres cases because the claims asserted are not founded upon the FTCA and the liability of the United States is not implicated. We believe this is an important distinction too often blurred, yet necessary to a reasoned analysis of the doctrines of immunity which flow from Feres. We therefore eschew referece to the second prong as "Feres doctrine cases." Nevertheless, the concept of intra-military immunity does have its roots in part of the rationale of Feres.

Feres is grounded upon three broad rationales.[3] First, "[t]he relationship between the government and

[3]We reiterated these rationales in a recent application of the Feres doctrine, Shaw v. United States, 854 F.2d 360 (10th Cir. 1988).

the members of its armed forces is 'distinctively federal in character.'" Feres, 340 U.S. at 143 (quoting United States v. Standard Oil Co. of Cal., 322 U.S. 301, 305 (1947)). Second, "statutory veterans' benefits provid[e] an upper limit of liability for the Government as to service-connected injuries.'" Johnson, 481 U.S. 681, 690 (quoting Stencel Aero Eng'g Corp. v. United Staes, 431 U.S. 666, 673 (1977)). Third, suits by a service member against the government "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S. 52, 59 (1985).

The doctrine of intra-military immunity is an outgrowth of the third Feres rationale that decries the propriety of civilian courts delving into military matters and calling to bar military decisions and institutions. Illustrative is Chappell v. Wallace, 462 U.S. 296 (1983), the seminal case applying the doctrine of intra-military immunity. In Chappell, the Court considered a claim for damages by enlisted military personnel against their superior officers. The plaintiffs alleged the officers violated plaintiffs' consitutional rights and discriminated against them on account of race. The Court, guided by Feres rationale, refused to allow application of Bivens v. Six Unknown Named Agents of Federal Burau of Narcotics, 403 U.S. 388

(1971), to create a consitutionally founded claim by a soldier against his commander. The Court stated:

> "The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by military personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in Feres, we must be concern[ed] with the disruption of "[t]he peculiar and special relationship of the soldier to his superiors" that might result if the soldier were allowed to hold his superiors in court.

Chappell, 462 U.S. at 304. In accord with Chappell, courts have granted immunity to persons whose military authority is the basis for a plaintiff's claim of liability. See Miller v. Newbauer, 862 F.2d 777 (9th Cir. 1988); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985). Additionally, courts

have also extended intra-military immunity to persons not actually supervising the plaintiff, but nonetheless exercising military responsiblity. See Stauber v. Cline, 837 F.2d 395 (9th Cir.), cert. denied, 109 S.Ct. 55 (1988) (defendants were plaintiff's coworkers); Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) (defendants were civilian employees who operated a stable for military purposes); Mattos v. United States, 412 F.2d 793 (9th Cir. 1969) (defendant was same rank as injured person but driving the truck in which party was riding during a military exercise). In the cases rejecting liability of military commanders or persons exercising purely military functions, the courts have generally expressed concern for

preserving the harmonious relationships within the military establishment. For the same reason, courts have been reluctant to entertain civil rights actions involving military personnel. Miller v. Newbauer, 862 F.2d 771 (9th Cir. 1988); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Martelson v. Temple, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Thus, our evolving jurisprudence has created a zone of protection for military actors, immunizing actions and decisions which involved military authority from scrutiny by civilian courts. It is our conclusion, however, that this zone was never intended to protect the personal acts of an individual when those acts in no way implicate the function or

authority of the military. We can find nothing that would dictate a contrary conclusion.[4]

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[4]The district court relied upon Johnson to support its conclusion that the military nature of the tort-feasor's conduct is irrelevant to whether he may be sued by a soldier. Yet, Johnson holds only that a soldier may not sue the government even if the government employee who caused an injury was not in military service. The Court in no way dealt with the circumstances under which one soldier may sue another. Moreover, even though Johnson is supported by all three Feres rationales, only the military discipline rational applies to intra-military immunity. As the Court noted; "[M]ilitary discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government . . . have the potential to undermine military discipline in the broadest sense of the word." Johnson, 481 U.S. at 691. We fail to perceive how an action against a soldier who was not engaged in military conduct can threaten military discipline. Because Johnson deals only with a suit by a soldier against the United States, its holding is inapposite to this case.

We find most helpful the reasoning of the Eighth Circuit in Brown v. United States, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985). In deciding whether intra-military immunity would be granted to certain defendants, the court focused upon the nature of the defendants' conduct.

In Brown, plaintiff's son, a black soldier, was subjected to a mock lynching by several noncommissioned officers while he attended an off-duty party. Plaintiff sued the United States, the soldiers who participated in the lynching episode, and the commanding officer for civil rights violations. While upholding the dismissal of the action against the United States and the commanding officer on Feres grounds, the

court held the individual soldiers subject to suit. The court determined the most appropriate aspect of liability is the "military purpose or mission" of those acts. Brown, 739 F.2d at 368. Looking at the actions of the defendant noncommissioned officers, the court stated: "The activity that is at issue in this claim is of a distinctly non-military nature: the alleged participation of a group of men at a holiday weekend drinking party in the mock lynching of a young black man." Brown, 739 F.2d at 369. In taking this focus, the court recognized neither the institution of the military itself nor the exercise of command authority was implicated in the defendants' alleged actions. Thus, immunity was not required. We endorse this view.

While civilian courts have a legitimate concern for protecting the harmony of the military establishment to prevent an erosion of discipline, we do not believe this concern should be extended to claims that arise outside the military function. When a soldier commits an act that would, in civilian life, make him liable to another, he should be allowed to escape responsibility for his act just because those involved were wearing military uniforms at the time of the act. When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority. Mindful of the Supreme Court's observation in Feres that courts should not create causes against the

military when they have not been recognized in the past, we nonetheless believe that common-law actions between military persons for distinctly nonmilitary acts break no new ground. Except for the penumbra of Feres, there would be no question that the defendant in this case could be called to task for his alleged acts. The only question is whether he was performing a military act at the time of the incident.

The issue thus devolves into whether the act of driving to his duty station was a military act. We think not. If one were to view this question as synonymous with whether the act of driving was "incident to military service," the answer would have to be

different.[5] Indeed, it is hard, if not impossible, to decide at what point actions leading to the performance of a military task are not incident to that end. Yet, if one focuses on the military purpose or mission of the defendant's conduct precipitating plaintiff's claim in the context of a need to protect military integrity, harmony, or authority, one must decide the mere act of driving to work, without more, is not the performance of a military act.

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[5]We distinguish this case from Shaw where we held that an injury sustained while driving to one's place of duty was an injury incident to military service. Shaw is a classic Feres case which applies the strict rationales Feres mandates. As we have already noted, intra-military actions giving rise to the issue of military immunity are judged by different standards.

In our judgment, the trial court erred in dismissing the causes on immunity grounds. We hold that within the peculiar circumstances of this case, the act out of which defendant's alleged negligence arose was not a military act; hence, the defendant was not entitled to a claim of military immunity. The judgments of the district court are REVERSED AND REMANDED for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JAMES E. TASSIN, Plaintiff	)	
v.	)	Civil Action No. 87-2591-S
JAMES NENEMAN, Defendant.	)	

SANDRA DURANT, et al., Plaintiff,	)	
v.	)	Civil Action No. 87-2592-S
JAMES NENEMAN, Defendant.	)	

MEMORANDUM AND ORDER

At first blush, these consolidated lawsuits appear to be ordinary negligence actions. Plaintiff Sandra Durant's deceased husband Charles Durant and plaintiff James Tassin were running along a roadway in Riley County, Kansas on August 10, 1987, when they were

struck by a motor vehicle being driven by defendant James Neneman. Charles Durant received fatal injuries from the impact and died shortly after noon on August 10. Tassin also received injuries, but was treated and released. The fact that brings these actions out of the realm of simple tort claims is that Durant, Tassin, and Neneman were all members of the armed forces. With an extremely unfortunate result, the much-criticized Feres doctrine will prevent plaintiffs' claims from ever being heard in federal court.

The facts of these two cases are simple and uncontroverted. Durant and Tassin were bringing up the rear in a formation of soldiers during a physical training exercise along a roadway on Fort Riley, Kansas, a United States Army

base. Both men held the rank of sergeant and were on active duty. Lietenant Neneman was in military uniform but was in his private vehicle en route to his duty station at the base when he struck Durant and Tassin. He was also on active duty status at the time, but apparently he lived away from the base and commuted to his duty station. The military police at Fort Riley investigated the accident, and a court martial proceeding against Lietenant Neneman for negligent homicide is now pending.

The court need not devote a great deal of discussion to the Feres doctrine, for several United States Supreme Court justices recently had the occasion to fully analyze the doctrine from its very beginning. See United

States v. Johnson, 95 L.Ed. 2d 648, 655-59 (1987) (opinion of Justice Powell for the majority); id. at 659-67 (Scalia, J., dissenting). In short, the Feres doctrine prohibits service members from bring tort suits against the Government "for injuries that 'arise out of or are in the course of activity incident to service.'" Johnson, 95 L.Ed. 2d at 655 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)).*

*The fact that the plaintiffs sued Lietenant Neneman in his individual capacity instead of naming the United States Government does not affect application of the Feres doctrine. "Courts have long applied the reasoning in Feres to preclude suits for negligence against individual officers of the United States military." Bois v. Marsh, 801 F.2d 462, 470 (D.C. Cir. 1986). See also Brown v. United States, 739 F.2d 362, 366 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985); Jaffee v. United States, 663 F.2d 1226, 1234-35 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982); Hass v. United States, 518 F.2d 1138, 1143 (4th Cir. 1975).

The only argument plaintiffs make in disputing application of the Feres doctrine is that the defendant tortfeasor was not acting within the scope of his employment at the time of the accident. Plaintiffs place critical importance on the fact that Lieutenant Neneman was not on shift, but rather was commuting to his duty station, at the time of the accident. Unfortunately, Johnson completely invalidates this argument.

In Johnson, the Court stated the following:

> Although all of the cases decided by this Court under Feres have involved allegations of negligence on the part of members of the military, this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine. Nor have the lower courts understood this fact to be relevant under Feres. Instead, the Feres doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries.

95 L. Ed. 2d at 655-57 (footnotes omitted). While plaintiffs emphasize the status of the defendant, the court in Johnson completely disregarded this and focused on the status of the injured party. While plaintiffs stress the location of the accident (on base but along a road accessible to the general public), the Supreme Court expressly found that "it 'makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] service-man.'" Johnson, 95 L.Ed. 2d at 657 (quoting Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 672 1977)). The focus of the Supreme Court in Johnson concerned the claimant - was he or she in the military and did the

accident arise out of or was it incident to military service? The status of the tortfeasor was secondary, if relevant at all. Indeed, the Court stated:

> "Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's country. Suits brought by service members against the Goverment for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

95 L. Ed. 2d at 658-59.

This Court cannot be concerned with the wisdom of the Supreme Court's decision, because it is the law of the land. Indeed, Justice Scalia pointed out the irony of some of the Feres

doctrine's effects, such as permitting a suit against the Goverment by a soldier if his injury is not incident to service, e.g., if Tassin and Durant had been off-duty and riding bicycles for pleasure along the same road at the time they were struck by Neneman. The narrow and perhaps illogical application of the doctrine does not change the required result in this case. Indeed, the Sixth Circuit recently decided a case under the Feres doctrine in the wake of Johnson, in which it made clear the path this court must take:

> Review of [the] recent Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the event,

the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense-combat purpose of the military activity from which it arose.

Major v. United States, 835 F.2d 641, 644-45 (6th Cir. 1987). But see Johnson, 95 L. Ed. 2d at 665 (Scalia, Jr., dissenting) (stating that a soldier who suffers a service-connected injury can sue a civilian tortfeasor).

Tragic though it may be, the court is compelled to dismiss this lawsuit. Tassin and Durant were in formation performing a military training exercise at the time of the accident, and were thus injured during a service-related activity. Furthermore, they were injured by the negligence of a superior officer. The Feres doctrine bars this lawsuit.

IT IS BY THE COURT THEREFORE ORDERED that plaintiffs' motion for oral argument is hereby denied; IT IS FURTHER ORDERED that defendant's motion to dismiss be granted.

DATED: This 31st day of March, 1988, at Kansas City, Kansas.

s/ Dale E. Saffels

DALE E. SAFFELS
United States
District Judge

Nos. 89-762
89-776

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1989

SANDRA DURANT, Personally and on Behalf of the Heirs at Law of CHARLES N. DURANT, DECEASED, and SANDRA DURANT, as Administratrix of the Estate of CHARLES N. DURANT, DECEASED, and JAMES E. TASSIN,
Respondents,

vs.

JAMES NENEMAN,
Petitioner.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 28, 1989

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

The respondents assert that a Writ of Certiorari should not be issued because the United States Court of Appeals for the Tenth Circuit entered a judgment in this proceeding which was based upon a correct decision on the following issue: Whether or not the Tenth Circuit Court of Appeals properly applied the *Feres Doctrine* to the facts presented in this case?

RELATED CASES

For some reason petitioner has filed separate Petitions for Certiorari, *Durant, et al. v. Neneman* (No. 776) and *Tassin v. Neneman* (No. 762). The cases have identical issues and facts and were decided in one opinion both in the District Court and in the Tenth Circuit. Respondents are therefore filing only one Brief in Opposition to the petitioner's two Petitions.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were Petitioner James Neneman and Respondents James E. Tassin, Sandra Durant, Personally and on behalf of the Heirs of Charles N. Durant, Deceased, and Sandra Durant, Administratrix of the Estate of Charles N. Durant, Deceased.

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Nos. 89-762
89-776

In the Supreme Court of the United States

OCTOBER TERM, 1989

SANDRA DURANT, Personally and on Behalf of the Heirs at Law of CHARLES N. DURANT, DECEASED, and SANDRA DURANT, as Administratrix of the Estate of CHARLES N. DURANT, DECEASED, and JAMES E. TASSIN,
Respondents,

vs.

JAMES NENEMAN,
Petitioner.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The original opinion of the Court of Appeals is reproduced in the appendix of the petitioner's Petition for a Writ of Certiorari. In regard to the decision of the Tenth Circuit Court of Appeals the respondents would ask this court to take note of Page A-17 thereof in petitioner's Petition for a Writ of Certiorari. On Page A-17 there appears an error in transcription beginning with the second sentence of the page which reads:

> "When a soldier commits an act that would, in civilian life, make him liable to another, he should be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act.*"

In fact, the sentence should read:

> "When a soldier commits an act that would, in civilian life, make him liable to another, he should *not* be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act.*" (Emphasis supplied) (See 884 F. 2d 1350 at 1354).

With the changes as stated herein and where reference to the opinion of the Tenth Circuit Court of Appeals is necessary in this Brief, citation is made to the appropriate page of the appendix to petitioner's Brief.

STATEMENT OF CASE

Respondents filed suit against petitioner in the United States District Court for the District of Kansas for monetary damages arising out of the negligence of the petitioner. Petitioner answered by filing a motion to dismiss for failure to state a claim upon which relief may be granted. Petitioner alleged that he was immune from suit under the *Feres Doctrine.* The District Court granted the relief sought by petitioner, however, the Tenth Circuit Court of Appeals reversed and remanded for trial.

It is undisputed that on August 10, 1987, petitioner James Neneman was driving his privately owned vehicle down a road known as National Rifle Range Road on Fort Riley, Kansas when he went off the roadway and struck both Durant and Tassin as they were running along the

shoulder of the road. Tassin was injured and Durant was killed. At the time of the accident petitioner Neneman was driving from his private residence in Chapman, Kansas to report for work at Fort Riley, Kansas.

It is undisputed that at the time of the accident petitioner Neneman was not acting within the scope of his employment with the United States Army. Respondents, at the time of the accident, were engaged in physical training on Fort Riley, Kansas.

National Rifle Range Road on Fort Riley, Kansas is a public road which, at the time of the accident, was open to all members of the public.

The United States Army is not of the position that *Feres* applies. It has requested the respondents to pursue recovery against the petitioner and his insurance carrier (USAA) for the cost of medical care provided by the United States Army for the injuries caused by petitioner. (See affidavits and accident report filed of record with the District Court in this proceeding.)

REASONS FOR DENYING PETITION

I. THE FERES DOCTRINE DOES NOT BAR THE FILING OF A LAWSUIT BY ONE SERVICE MEMBER AGAINST ANOTHER WHEN THE SECOND SERVICE MEMBER CAUSES INJURY WHILE ACTING IN HIS PERSONAL OR INDIVIDUAL CAPACITY.

A. The Feres Doctrine Is a Federal Tort Claim Defense. There Is No Federal Tort Claim Unless an Employee of the United States Has Committed a Negligent or Wrongful Act or Omission While Acting Within the Scope of His Employment.

II. MILITARY PERSONNEL, ENGAGED IN DISTINCTLY NON-MILITARY ACTS, ARE ACTING AS CIVILIANS AND ARE THUS SUBJECT TO CIVIL AUTHORITY.

A. Act of Driving to Duty Station Is Not a Military Act Protected Under the Feres Doctrine.

B. Whether or not driving to and from work is an act in the scope of employment is governed by state law.

III. THE SUPREME COURT'S RULING IN FERES WAS NOT INTENDED AS A BAR TO AN ACTION BY ONE SERVICEMAN AGAINST ANOTHER IN MATTERS WHOLLY UNRELATED TO MILITARY AFFAIRS. IF THE FERES DOCTRINE IS APPLIED IN SUCH A MANNER, THEN RESPONDENT RESPECTFULLY REQUESTS THAT FERES V. U.S. (SUPRA) BE OVERRULED.

IV. NEITHER THE FEDERAL EMPLOYEES COMPENSATION ACT, THE VETERANS BENEFIT ACT NOR THE UNIFORM CODE OF MILITARY JUSTICE BAR THIS CLAIM.

ARGUMENTS AND AUTHORITIES

I. THE FERES DOCTRINE DOES NOT BAR THE FILING OF A LAW SUIT BY ONE SERVICE MEMBER AGAINST ANOTHER WHEN THE SECOND SERVICE MEMBER CAUSES INJURY WHILE ACTING IN HIS PERSONAL OR INDIVIDUAL CAPACITY.

A. The Feres Doctrine Is a Federal Tort Claim Defense. There Is No Federal Tort Claim Unless an Employee of the United States Has Committed a Negligent or Wrongful Act or Omission While Acting Within the Scope of His Employment.

The immunity established in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 2d 152 (1950) attaches only when an action has been brought against the government under the Federal Tort Claims Act or when conditions justify immunity for a military actor. Liability for non-military conduct by military personnel should not be shielded by the Feres Doctrine.

The petitioner in his reasons for granting the Writ relies in a large part upon the decision of the Tenth Circuit Court of Appeals in *Shaw v. U.S.*, 854 F. 2d 360 (10th Cir. 1988). The distinguishing factor between *Shaw* and the present action is the same distinction which can be found in every case relied upon by the petitioner. Namely, in *Shaw* there was no doubt whatsoever that the soldier committing the wrongful act was doing so while in the "scope of his employment" with the United States of America. In the particular circumstances of the *Shaw* case the employee of the United States who allegedly committed the wrongful act was none other than an army soldier who was operating a vehicle owned by the United States Army at the time of the alleged wrongful act. The Tenth Circuit,

who decided *Shaw*, distinguished the same in the instant case by stating,

> "We distinguish this case from *Shaw* where we held that an injury sustained while driving to one's place of duty was an injury incident to military service. *Shaw* is a classic *Feres* case which applies the strict rationales *Feres* mandates. As we have already noted, intra-military actions giving rise to the issue of military immunity are judged by different standards."

Durant v. Neneman, 884 F. 2d 1350 (1989) at 1354, FN 5.

The petitioner also relies upon *United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987). The Tenth Circuit found the trial court's reliance upon the Johnson principle "incorrect". (*Durant v. Neneman*, supra at 1352). The petitioner herein asked this court to extend the ruling in *United States v. Johnson* in a manner in which this court could never have intended. *Johnson* concerned a federal tort claim made by a surviving widow of the serviceman who was killed due to the alleged negligence of a federal employee while the federal employee was engaged in his duties as an employee of the Federal Aviation Administration (FAA). *Johnson* simply extended the bar of the Feres Doctrine to include not only military personnel, but any civilian employee of the United States of America. *Johnson* provides that if there is a factual basis to support a federal tort clai n then the activities of the alleged tortfeasor are irrelevant for the purposes of consideration of a *Feres* Doctrine defense. Johnson does *not* state that the *Feres* Doctrine bars a service member who was injured while engaged in a military related activity from suing another service member for negligently causing the injury when the tortfeasor is *not* acting within the scope of his employment or is engaging in non-military conduct. Reliance upon *Johnson* by the petitioner is misfounded and misapplied to the facts of the instant case.

The petitioner has further relied upon *U.S. v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987). In that case this court held that a service member may not maintain a *Bivens* (*Bivens v. Six Unknown Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)) type action for the conduct of other service members in the course of their duties as officers and agents of the United States. There is no allegation, nor is there any basis for an allegation, in the instant proceeding that the petitioner caused injury to the respondents while the petitioner was engaged in the course of his duties as an officer or agent of the United States. Again, the petitioner is attempting to misapply the Feres Doctrine by encouraging this court to turn itself "inside out" and rule that even though there is no basis for a federal torts claim act (because the negligent party was not acting in the "scope of his employment") that somehow *Feres* applies because the injured parties (Durant and Tassin) were acting "incident to service" when they were run down by the petitioner.

The petitioner herein has attempted to convince this court that there exists a conflict among the circuits based upon ten cited cases:

1. *Welch v. United States*, 446 F. Supp. 75 (D. Conn. 1978). In *Welch* the plaintiff was struck by a navy vehicle and sued the United States of America for damages. The individual operating the navy vehicle was unquestionably acting within the scope of his employment when he struck and killed Welch, the plaintiff. This case is inapposite to the facts in the instant case.

2. In *Millang v. United States*, 817 F. 2d 533 (9th Cir. 1987) the plaintiff, while off duty, was run over by an on duty military policeman driving a military police vehicle. Once again, the allegedly negligent person was indisputably acting within the scope of his employment as a

military policeman when he ran over Millang thus making the case factually distinguishable from this case.

3. *McVan v. Bolco Athletic Co.*, 600 F. Supp. 375 (E.D. Pa. 1984). In *McVan* the plaintiff sued Bolco for injuries allegedly caused by a defectively designed base used in a softball game. The base was owned by the United States. Bolco then filed a third party complaint against the United States for negligence by the United States Army. The United States moved to dismiss the third party complaint premised on the Feres Doctrine. The court held that the third party complaint against the United States was barred by *Feres* because the plaintiff could not sue the United States for alleged negligence in the design or inspection of the base or in the organization of the softball game because at the time plaintiff was injured he was engaged in a military activity and thus he could not sue the United States of America under the Federal Tort Claims Act pursuant to the Feres Doctrine. It is important that this ruling did not affect the action of the plaintiff, McVan, against Bolco even though the plaintiff was engaged in a military activity when injured. The status of the plaintiff did not render Bolco immune from suit because Bolco was not an agent of the United States (just as Neneman was not an agent of the United States in the context of the instant case).

4. In *Chambers v. United States*, 357 F. 2d 224 (8th Cir. 1966) the plaintiff was injured in a swimming pool owned and operated by the United States. Again, the scope of employment was not an issue. The liability of the United States, if any, was either direct or by respondent superior. It was unquestioned in *Chambers* that the elements of 28 U.S.C., Sec. 1346(b) were satisfied. The injury was caused by the alleged negligence or wrongful act or omission of an employee of the government while acting

within the scope of his employment. If this section had not been satisfied, then the considerations of *Feres* need never have been mentioned. The case, again, is totally inapposite to the facts in the instant case.

5. In *Knight v. United States*, 361 F. Supp. 708 (W.D. Tenn. 1972) the plaintiff again sought compensation for a drowning by a service member in a swimming pool owned and operated by the United States of America. The facts and holding of Knight are inapplicable to the instant case for the same reasons as cited above in *Chambers*.

6. In *Degentesh v. United States*, 230 F. Supp. 763 (N.D. Ill. 1964) the plaintiff sued for injuries that were caused by an employee of the United States while the employee was driving a vehicle owned by the United States Navy. The negligent individual was acting within the scope of his employment. Accordingly the question of plaintiff's activities became relevant and material.

7. In *Keisel v. Buckeye Donkey Ball, Inc.*, 311 F. Supp. 370 (E.D. Va. 1970) the plaintiff was denied the right to sue the United States upon the same grounds as cited in *McVan v. Bolco*, supra. The original suit against Buckeye Donkey Ball, Inc. was not dismissed. Even though Keisel was engaged in a military activity at the time of his injury Buckeye was not acting within the scope of employment by the United States. Thus, while the case against the United States was dismissed the case against Buckeye Donkey Ball, Inc. was not.

8. In *Nagy v. United States*, 471 F. Supp. 383 (D.C. Cir. 1979). In *Nagy* the plaintiff sought to sue the United States and certain federal officials for negligence and constitutional villations. The court reiterated *Feres* and applied it to the constitutional violations as well. In *Nagy* it was uncontroverted that the individual defendants acted in their official capacity as employees of the United States

when allegedly violating Nagy's constitutional rights. Thus, the case is not applicable to the facts in the instant case.

9. In *United States v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 2d 139 (1954) the court held that the plaintiff was entitled to pursue a federal tort claim for injuries caused by medical malpractice sustained in a Veterans Administration Hospital after Brown had been discharged from the armed services. The case does not support the petitioner's position in the instant case as it does not address facts even remotely similar to those at hand.

10. The cases cited by petitioner dealing with an attempt to circumvent the Feres Doctrine by not naming the United States, namely *Gaspard v. United States*, 544 F. Supp. 55 (E.D. La. 1982); *Jaffee v. United States*, 663 F. 2d 1226 (3rd Cir. 1981) and *Bois v. Marsh*, 801 F. 2d 462 (D.C. Cir. 1986) do not apply to the facts of the instant case. In each of those cases the plaintiffs were attempting to circumvent the Federal Tort Claims Act by naming an individual employee of the government who was indisputably acting within the scope of his or her employment at the time of the wrongful act or omission. In the instant case it is undisputed that Neneman was not acting within the scope of his employment and thus the government could never have been responsible for his acts no matter who he would have run over; be it a sergeant in the United States Army or a civilian.

As the Tenth Circuit Court of Appeals stated in its opinion:

> "When a soldier commits an act that would, in civilian life, make him liable to another, he should not be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act.*"

Durant v. Neneman, supra at 1353. Later the Tenth Circuit in the same case stated:

> "Yet if one focuses on the military purpose or mission of the defendant's conduct precipitating plaintiff's claim in the context of a need to protect military integrity, harmony, or authority, one must decide the mere act of driving to work, without more, is not the performance of a military act."

(*Durant v. Neneman*, supra, at 1354.)

II. MILITARY PERSONNEL, ENGAGED IN DISTINCTLY NON-MILITARY ACTS ARE ACTING AS CIVILIANS AND ARE SUBJECT TO CIVIL AUTHORITY.

A. The Act of Driving to a Duty Station Is Not a Military Act Protected Under the Feres Doctrine.

In the instant case the Court of Appeals analyzed the rationale behind the Feres Doctrine and properly applies the *Feres* progeny to the facts in the instant case. They found that the instant case is not a "true Feres" case wherein liability is asserted by a serviceman against military actors for acts committed within the scope of their employment with the military service. Rather, they held that the instant case is a "intra-military" case which is an outgrowth of the *Feres* rationale. Thus, they found that the court must examine the case factually to determine whether or not allowing the civil lawsuit to proceed would involve the court "delving into military matters and calling to bar military decisions and institutions". (Citing *Chappel v. Wallace*, 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983) and circuit court cases which similarly granted immunity to persons whose military authority is the basis for a plaintiff's claim of liability. *Miller v. Newbauer*, 862

F. 2d 777 (9th Cir. 1988); *Bois v. Marsh*, 801 F. 2d 462 (D.C. Cir. 1986 and *Trerice v. Summons*, 755 F. 2d 1081 (4th Cir. 1985).

The Tenth Circuit Court then carefully examined those cases which extended intra-military immunity to persons not actually supervising the plaintiff, "but nonetheless exercising military responsibility". Citing *Stauber v. Cline*, 837 F. 2d 395 (9th Cir.), Cert. denied, 109 S. Ct. 55 (1988); *Haas v. United States*, 518 F. 2d 1138 (4th Cir. 1975) and *Mattos v. United States*, 412 F. 2d 793 (9th Cir. 1969). Thus, the Circuit Court reviewed this case to determine whether or not the zone of protection under the "intra-military immunity" provisions of *Feres* and its progeny was intended to protect the personal acts of an individual when those acts in no way implicate the function or authority of the military.

The facts of the instant case reveal that the petitioner, Lt. Neneman, was driving his privately owned vehicle upon a public roadway in the Fort Riley Military Reservation. He was doing nothing which could be determined as military in nature. He was making no military or command decision and was not engaged in a military act. As the Circuit Court noted, petitioner should not be allowed to escape responsibility for his act. As the Circuit Court aptly points out, the issue in this case devolves into whether or not the act of the petitioner in driving to his duty station was a military act. The Circuit Court properly answered the question in the negative.

B. Whether or Not Driving to and From Work is an Act in the Scope of Employment Is Governed by State Law.

In *Williams v. United States*, 350 U.S. 857, 77 L. Ed. 2d 372 (1955) this court ruled that whether or not a soldier

is "acting within the scope of his official employment" is not controlled by federal law, but rather by the law in the state wherein the incident occurred. *Patton v. United States*, 311 F. 2d 604 (10th Cir. 1962); *Cooner v. United States*, 276 F. 2d 220 (4th Cir. 1960). The Kansas Supreme Court has repeatedly held that an individual traveling to and from work is not acting within the scope of his employment. (*Pearson v. Electric Service Co.*, 166 Kan. 300, 201 P. 2d 643 (1949); *Abbott v. Southwest Grain Co.*, 162 Kan. 315, 176 P. 2d 839 (1947); *Brinkley v. Farmers Elevator Mutual Ins. Co.*, 485 F. 2d 1283 (10th Cir. 1973)).

Every court that has considered the question has held that when a service member is proceeding from his home or some other non-duty related place to his place of duty or from his place of duty to his home or some other non-duty related place, the service member is not acting within the scope of his employment and there can be no federal tort claim filed against the government under the theory of respondeat superior (28 U.S.C., Sec. 1346(b)). *Peres v. United States*, 368 F. 2d 320 (1st Cir. 1966); *Bach v. United States*, 92 F. Supp. 715 (New York 1950); *Murphy v. United States*, 113 F. Supp. 345 (New York 1953); *Moye v. United States*, 117 F. Supp. 236 (Texas 1954); *Driscoll v. Harmon*, 124 Ariz. 15, 601 P. 2d 1051 (1979); *U.S. v. Eleazer*, 177 F. 2d 914 (4th Cir. 1949); *Proietti v. Levi*, 530 F. 2d 836 (9th Cir. 1976).

The Tenth Circuit, in the instant case, relied in a large part on the case of *Brown v. United States*, 739 F. 2d 362 (8th Cir. 1984), Cert. denied, 473 U.S. 904 (1985). In *Brown* the court focused upon the nature of defendant's conduct in determining whether "intra-military immunity" would be granted. The court in *Brown* correctly ruled that the activity of the defendants was one which was "distinctly non-military in nature". The court held that a

group of soldiers involved in a mock lynching of a young black man implicated neither the institution of the military itself nor the exercise of command authority. They ruled that a common law civil action would lie against the individual defendants, but not against the United States of America under the Federal Tort Claims Act. In this case Neneman's actions reflect only upon himself and do not implicate the military in any way.

III. THE SUPREME COURT'S RULING IN FERES WAS NOT INTENDED AS A BAR TO AN ACTION BY ONE SERVICEMAN AGAINST ANOTHER IN MATTERS WHOLLY UNRELATED TO MILITARY AFFAIRS. IF THE FERES DOCTRINE IS APPLIED IN SUCH A MANNER, THEN RESPONDENT RESPECTFULLY REQUESTS THAT FERES V. U.S. (SUPRA) BE OVERRULED.

The Federal Tort Claims Act by the express terms of its language allows recovery for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting *within the scope of his office or employment* . . .".[1]

It is the respondent's position that inasmuch as the Federal Tort Claims Act could never apply to the facts of

1. 28 U.S.C. § 1346(b). Subject to the provisions of Chapter 171 of this title (28 U.S.C., § 2671, et seq.) the district courts, together with the United States Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction in civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government *while acting within the scope of his office or employment*, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (Emphasis supplied).

the instant case and, since the *Feres* Doctrine is only a defense to a Federal Tort Claims Act case, then the Feres Doctrine and its progeny could never apply to bar suit by the respondent against the petitioner.

Petitioner is attempting to convince the court that, in essence, the passage of the Federal Tort Claims Act somehow took away the respondent's ability to file a common law action against the petitioner. Prior to the passage of the Federal Tort Claims Act and before the cases interpreting the act (among those *Feres*), there would have been little doubt that a common law action would lie by a soldier against another soldier who injured him while driving to work under circumstances wholly unrelated to military discipline or orders.

We would venture to state that there are probably now pending and have been decided in the various state and federal courts in this country hundreds, if not thousands, of cases involving two members of the military involved in an automobile accident (on the base or off the base) where in the "Feres Doctrine" was never raised as a defense because it was either illogical to assume that a private actor just by virtue of being in the army could escape liability or the defense attorneys simply were not as resourceful as in the instant case. Therefore, we grant to the petitioner and his attorneys their resourcefulness.

As the Tenth Circuit Court of Appeals so aptly points out, "the immunity established in *Feres* attaches only when an action has been brought against the government under the Federal Tort Claims Act". We do not believe that Congress ever intended to shield military personnel from common law actions based on their non-military conduct and if this court were to find some compelling reason to so rule, then we respectfully request that this court over-

rule *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 2d 152 (1950).

In *Brooks v. United States,* 337 U.S. 49, 93 L. Ed. 1200, 69 S. Ct. 918 (1949) the court was faced with an accident involving a government vehicle and a soldier who was off duty and on leave at the time of the incident. In *Brooks* this court found that it could not infer that Congress intended to bar all suits by servicemen particularly in view of the fact that Congress did not exclude servicemen from application of the act during its passage in 1946. In 1950 the *Feres* case came before this court and this court ruled that a soldier could not recover *under the Federal Tort Claims Act* for injuries that arise out of or are in the course of activity "incident to service".

As Justice Scalia aptly noted in his dissent in *U.S. v. Johnson,* 481 U.S. 681, 95 L. Ed. 2d 648, 107 S. Ct. 2063 (1987)

> "Perhaps without that scant (and subsequently rejected) textual support, which could be pointed to as the embodiment of the legislative intent that its other two rationales speculated upon, the Feres Court would not as an original matter have reached the conclusion that it did. Be that as it may, the speculation outlived the textual support, and the Feres Rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended."

Justice Scalia went on to say:

> "In sum, neither the three original Feres reasons nor the post hoc rationalization of 'military discipline' justifies our failure to apply the FTCA as written. Feres was wrongly decided and heartily deserves the 'widespread, almost universal criticism it has received."

Because the Federal Tort Claims Act did not exempt certain claims brought by servicemen against other servicemen and because of the reasons as enumerated in the dissent of Justice Scalia in *U.S. v. Johnson* (supra), we respectfully request that the court overrule *Feres v. United States* (supra).

IV. NEITHER THE FEDERAL EMPLOYEES COMPENSATION ACT, THE VETERANS BENEFIT ACT NOR THE UNIFORM CODE OF MILITARY JUSTICE BAR THIS CLAIM.

The petitioner continues to argue to the court that somehow the Federal Employees Compensation Act (FECA), 5 U.S.C., § 8101, et seq. and the Veterans Benefit Act (FBA), 38 U.S.C., § 301, et seq. somehow apply this case. The FECA does not apply to members of the military. It is strictly a system of compensation for civilian employees of the United States of America and thus has no application to the instant case (5 U.S.C., § 8101(1)). *Sims Motor Transportation Lines, Inc. v. Foster,* 293 S.W. 2d 226 (Ky. 1956). Further, in *Vantrease v. U.S.,* 400 F. 2d 853 (5th Cir. 1968) and *Skrocki v. Butler,* 324 F. Supp. 1042 (Mich. 1971) the courts held that under the FECA government employees have the right to pursue tort actions against a government employee who negligently causes injury while acting outside of the scope of his employment; and the United States retains the right of subrogation to collect from a negligent third party moneys paid to an employee for injuries caused by the negligent third party (5 U.S.C., § 8131 (1987)).

As to the Veterans Benefit Act (38 U.S.C., § 301, et seq.), defendant has cited no case law and there is no case law which holds that a tortfeasor acting in his individual capacity and not as an agent of the United States is to be

granted immunity from liability in a civil suit merely because the deceased party fortuitously had contracted to obtain some form of disability compensation.

Finally, the petitioner in his brief has raised the Uniform Code of Military Justice (UCMJ) and the fact that the military authorities proceeded against petitioner to somehow be controlling as to whether or not the petitioner was acting within the scope of his employment. Jurisdiction under the Uniform Code of Military Justice (UCMJ) and a determination of "scope of employment" are completely separate and unique considerations. The case of *Solorio v. United States*, 483 U.S. 435, 107 S. Ct. 30, 97 L. Ed. 2d 364, rehearing denied, 483 U.S. 1056 (1987) is directly on point with the issue despite the fact that the *Solorio* opinion does not contain the word "Feres". *Solorio* states that a service member is constantly subject to the jurisdiction of the Uniform Code of Military Justice even though he may be acting outside of the scope of his employment at the time of an alleged infraction. Thus, the petitioner's reliance upon the UCMJ is wholly unfounded in these circumstances.

CONCLUSION

The Tenth Circuit Court of Appeals reviewed the applicable law of *Feres* and its progeny and applied the facts to the instant case. Its opinion is well reasoned and correct. The United States of America, via the U. S. Attorney, has not asked to be substituted for the petitioner (as is usually the case when the United States feels there may be some government action involved). What this case really involves is an insurance company for the petitioner attempting to cut its losses by collecting premiums without incurring responsibility for payment of damages caused by the negligence of its insured. This is important for the insurance company of the petitioner (USAA) who insures mainly officers in the military of the United States.

For the reasons as stated in this Brief respondents respectfully submit that the ruling of the Tenth Circuit Court of Appeals was correct and should be allowed to stand. In the alternative, respondents respectfully suggest that *Feres v. United States* was wrongly decided and does not reflect the intent of Congress and should be overruled.

Respectfully submitted,

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